Supreme Court, U. S.
FILED
JAN 3 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-357

LINMARK ASSOCIATES, INC. and WILLIAM MELLMAN,

Petitioners,

—v.—

THE TOWNSHIP OF WILLINGBORO and GERALD DALY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[redacted]E AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY [redacted] BRIEF *AMICI CURIAE*

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MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOR LEAVE TO FILE BRIEF AMICI CURIAE

The American Civil Liberties Union and the American Civil Liberties Union of New Jersey respectfully move, pursuant to Rule 42 of this Court's Rules, for leave to file the within brief amici curiae. Counsel for both the petitioners and the respondents have consented to the filing of this brief.*/ In

*/ Copies of the letters of consent are being filed with the Clerk.

addition, both counsel consented to this brief's being filed at least one week after December 23, the date on which the petitioners' brief was due. Because of the holiday season, however, this brief could not be prepared, produced and filed within the time required. Accordingly, although consents to the filing have been granted, this motion is required by the Rules.

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members. The American Civil Liberties Union of New Jersey is the statewide affiliate. The ACLU is dedicated solely to defending the safeguards of the Bill of Rights. Central among those protections is the First Amendment's freedom of speech, a prerequisite to the continued maintenance of a free society. No less important, however, is the vindication of equal rights for all members of our society, including the right to equal access to public and private housing.

In previous cases the ACLU has represented before this Court both sets of interests contending for recognition in this case. We represented the appellant in Bigelow v. Virginia, 421 U.S. 809 (1975), contending that speech could not be labeled "commercial" and ipso facto stripped of all First Amendment protection, and we are currently representing the appellants in Bates v. State Bar of Arizona, No. 76-316, arguing that restrictions on advertising by attorneys violate the First

Amendment. On the other hand, we have pressed before the Court the rights of minority group members to fair and equal access to housing opportunities. See Hills v. Gautreaux, ___ U.S. ___, 47 L.Ed.2d 792 (1976). Indeed, while the ACLU opposes blanket restrictions of First Amendment rights even where "commercial" speech is concerned, it also supports laws aimed against blockbusting and fear-provoking real estate practices.

In this case, restrictions on First Amendment activity are sought to be justified ostensibly to aid in preserving the worthwhile goal of integrated housing in a community. But, as in so many other areas, our experience has been that restrictions on speech and expression are an impermissible method to achieve societal goals - even laudible ones. While it may arguably be valid to impose certain narrow restrictions on speech in order to facilitate fair housing, by discouraging the misrepresentation associated with blockbusting practices, the record in this case does not demonstrate such narrowly focused regulation. Instead, the prohibitions on speech are justified by vague fears of reactions of members in the community to the presence of "For Sale" or "Sold" signs on residential property. Such vague fears cannot justify the suppression of information, commercial or not. Our constitutional system - which includes both freedom of speech and equality of opportunity - is better served by the free flow of lawful, truthful informa-

tion, with any negative effects of such information countered by community educational efforts. As in so many other areas, we submit that the constitutionally proper response to "bad" speech, or to the supposed "bad" effects of neutral speech, is more speech.

It is to present this analysis that amici respectfully move for leave to file this brief.

Respectfully submitted,

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION
AND THE AMERICAN CIVIL LIBERTIES UNION OF
NEW JERSEY, AMICI CURIAE

Interest of Amici

The interest of amici appears from the foregoing motion.

Statement of the Case

This case involves the constitutionality of a Willingboro, New Jersey local ordinance which has the effect of prohibiting individual homeowners and realtors from placing "For Sale" or "Sold" signs on private residential property. The ordinance has not been defended on aesthetic or other grounds unrelated to the content of the communication. Nor is there any evidence that such signs were untruthful or contained misrepresentations, or that they were used as part of any unlawful practice of "blockbusting," or other effort by realtors to discriminate on racial grounds in the sale of homes. The case thus squarely raises the issue of whether, and under what circumstances, the state may prohibit the communication of truthful, lawful information regarding a proposed or consumated commercial transaction.

The record is, at best, opaque and ambivalent.

The first major aspect of the record consists of the transcript of public hearings held by the township council to consider the proposed ban on "For Sale" and "Sold" signs. A parade of speakers - homeowners, realtors, local officials and other citizens - gave their views of the proposal and the problems it was intended to deal with. Essentially three themes were sounded: (1) that Willingboro was a relatively transient community for

factors and reasons wholly apart from racial considerations; (2) that there is a relatively high amount of real estate activity in the community, accompanied by fairly aggressive practices, but with no evidence of any blockbusting tactics or improper appeals by realtors to racial fears or prejudices; and (3) that in the period from 1970 to 1973, just prior to the consideration and passage of the ordinance, the non-white population increased from approximately 12 per cent of the community to 18 per cent. At the public hearings concern was expressed that the effect of a "forest of signs" was to create the impression of a "high turnover" in the neighborhood and a resulting "bad" image of the community. (App. 44a, 77a, 79a, 90a).1/

At the District Court hearing, however, there was a shift in emphasis in the reasons given for enacting the ordinance. Citizen concern with vague feelings of image was replaced by more specific testimony of a concern for preserving racial stability in

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1/ "App. ___" refers to the Joint Appendix. The actual statistics indicated that, before passage of the challenged ordinance, there were approximately 200 signs on lawns of the approximately 11,000 homes in the community. (App. 37a).

the community and stabilizing the community at a magical "80/20" ratio. (App. 160a, 170a, 181a-182a). And the primary rationale advanced for the ordinance was to prevent "panic" selling by white families reacting to the presence of signs on their block and the resulting concern that the neighborhood would change with an influx of black families. (App. 181a, 244a). In this view, the ordinance was designed to prevent a "bad" "emotional" reaction by homeowners and to nip panic selling in the bud, by eliminating the signs which "tended to induce people" to place their homes on the market. (App. 206a-207a, 240a).

The ambivalent nature of the record is reflected by the sharply differing reaction of the four judges below who studied it. Two judges found that the motive for the ordinance was a benevolent attempt to preserve racial harmony, integration and stability in the community by preventing incipient panic selling by fearful white families overreacting to the presence of signs on residential property. These judges drew support for their assessment of community motives from the fact that the ordinance was supported by the township Human Relations Commission. The two other judges - District Judge Fisher and Circuit Judge Gibbons - found the motives and purposes quite the opposite. To them, the motives behind the ordinance were in fact malevolent and unconstitutional, namely, to facilitate the preservation of a residential

racial quota of approximately 80 per cent white families and 20 per cent black families by preventing non-white families from having access to information about the availability of housing.

All would appear to agree that the purpose of restricting the flow of information about the availability of homes for sale was to slow the process of white families moving out and black families moving in. The factual dispute is whether the motive for bringing about this effect was good (i.e., to preserve an integrated community) or bad (i.e., to impose racial "stabilization" and quotas). We submit that resolution of this dispute is largely irrelevant to resolution of the controversy. First, even assuming that the motive was benevolent, the community has sought to achieve purportedly benevolent purposes in a manner and under circumstances which violate the First Amendment. More importantly, where there is such a deep dispute over whether the purpose of a restriction on the free flow of information is good or bad, the instinct of the First Amendment and its preference for the free market place of ideas must prevail. Where it cannot with relative confidence be determined whether or not suppressing the flow of information is intended to achieve valid societal goals, the First Amendment resolves the conflict for us, as it did in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, ___ U.S. ___, 48 L.Ed.2d 346 (1976):

> It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. 48 L.Ed.2d at 363.

SUMMARY OF ARGUMENT

This Court's decision in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra, makes it clear that the kind of commercial speech which was prohibited here is entitled to substantial protection under the First Amendment. And the protected interests in commercial information about the availability of private housing involve the rights of sellers and consumers equally. A restriction on such information infringes First Amendment rights and cannot be sustained simply because there might be alternative sources of the same information.

This case does not require the Court to determine the extent to which a variety of First Amendment rules and doctrines might be applicable to judge the validity of restrictions on commercial information. It is sufficient, based upon the Virginia State Board of Pharmacy decision, for the Court to rule that there is a substantial burden of justification on the government to demonstrate that the challenged restriction necessarily advances important societal interests suffi-

cient to overcome speech interests. The court below, however, failed to employ such an analysis and improperly placed the burden of persuasion on the plaintiffs.

The justifications offered by the government do not meet its burden of sustaining the validity of the challenged ordinance.

First, the ordinance cannot be upheld as mere regulation of the "time, place and manner" of expression, for it is content which is controlled.

Second, the ordinance cannot be sustained as a valid regulation of the content of speech. This Court has permitted regulation of speech because of its content in only a very few, limited kinds of situations. The kind of content control sought to be exercised here does not fit within any of those categories and cannot be justified by a generalized fear of the reaction of members of the community to seeing such signs on front lawns.

Finally, even assuming arguendo that controls on such signs could ever be employed as part of a systematic effort to avert blockbusting, panic selling and housing segregation, the record here fails to demonstrate anything approaching such serious circumstances or requiring the prohibition which was imposed. A generalized concern that the presence of "For Sale" signs

might have an impact on attitudes which might be translated into changing racial housing patterns is a grossly inadequate basis for prohibiting the communication of truthful information about lawful transactions. Rather than suppressing such information, because of the feared effect it might have, the municipality was constitutionally required to choose the alternative of community education, dialogue and consensus to deal with the problem.

ARGUMENT

WILLINGBORO'S PROHIBITION ON THE PLACEMENT OF "FOR SALE" AND "SOLD" SIGNS ON RESIDENTIAL PROPERTY IS AN INFRINGEMENT ON SPEECH PROTECTED BY THE FIRST AMENDMENT AND IS NOT JUSTIFIED BY THE RATIONALES OFFERED TO SUSTAIN THE PROHIBITION.

The court below, ruling without the benefit of this Court's decision in the Virginia State Board of Pharmacy case, took an extremely restricted view of the First Amendment protection to be afforded to "purely commercial speech" and concluded that such protection could be withdrawn as a result of "balancing the governmental interest involved against the precise limitation imposed." 535 F.2d at 796. The court then balanced the various factors and concluded that the restriction was justifiable. Amici submit that both the standard employed and the analysis engaged in were inadequate and that the decision below cannot stand.

A. The kind of commercial speech prohibited here now enjoys substantial First Amendment protection.

"For Sale" and "Sold" signs convey a simple commercial message. They are proposals to engage in economic activity and statements that such activity has occurred. While such a commercial purpose and content

once was thought to put such speech beyond the protection of the First Amendment, see Valentine v. Chrestensen, 316 U.S. 52 (1942), it is now established beyond argument that "commercial" speech enjoys substantial First Amendment protection. Bigelow v. Commonwealth of Virginia, 421 U.S. 809 (1975), Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council, supra. Indeed, Virginia State Board of Pharmacy makes it clear that any perjorative reference to "purely" commercial speech cannot substitute for an analysis of the issues involved, for what could be more "purely" commercial than information about the price of drugs. If normal First Amendment analysis applies to the sale of drugs, then surely it applies to the sale of a residential home.2/

2/ One of the reasons why the Court abjured reliance on a wooden categorical distinction between "purely" commercial speech and speech with ideational content was the ease with which non-commercial content could be supplied:

> Our pharmacist, for example, could cast himself as a commentator on store-to-store disparities in drug prices, giving his own and those of a competitor as proof. We see little point in requiring him to do so, and little difference if he does not. 48 L.Ed. 2d at 360.

(continued)

The doctrinal effect of these cases is to shift the inquiry away from the categorical nature of the speech and toward an analysis of the nature and purpose of the restriction on that speech. In short, commercial speech is presumptively entitled to substantial First Amendment protection, with the extent and nature of that protection turning on the nature and effect of the restriction.

Here, too, one could hypothesize slight changes in content which would surely take a sign out of the category of "purely" commercial, for example, "For Sale To Any Family" or "Sold Without Discrimination." The content of such altered messages would surely be constitutionally immune from automatic prohibition, because of the implicit political statement being made.

Ironically, it is the supportors of the ordinance themselves who conceived of the signs as communicating more than a "purely" commercial message. They were concerned about the "invisible" message that the aggregate of signs would convey, namely, that the community was "changing," and that people were selling their homes for whatever reason. Indeed, it was precisely that rather non-commercial message that the ordinance, whether for good or bad reasons, was designed to interdict. In effect, purely commercial speech has been banned because of the non-commercial message it was feared that speech would convey.

The First Amendment interest in commercial speech which this Court has now recognized stems from the central role of economic information in our society. In the housing field, just as in pharmacy and other commercial activities, it is central to the functioning of the economic and social system that information "as to who is producing and selling what product, for what reason, and at what price" be easily disseminated. Virginia State Board of Pharmacy, 48 L.Ed.2d at 360.

Moreover, the First Amendment right runs not just to those who wish to convey the message - in the instant case, the homeowner or realtors - but also to the consumers who will hear or see the message and make the ultimate economic decisions. Virginia State Board of Pharmacy, supra; Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972). Significantly, the District Court here found that with the banning of signs the consumers would be limited in their informational options and be forced to rely inordinately on the services and judgments of real estate agents in seeking housing. The result would be a serious potential censorship of information by the intermediaries - the realtors - "who may be very selective in choosing which home...[they wish] to show a potential buyer." (App. 9a). In Virginia State Board of Pharmacy the Court was similarly concerned with the censorship effect of denying to consumers basic price information about something as important as medication. This Court found that informa-

tion of that kind was surely as important to the average person as political information: "As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." 48 L.Ed.2d at 359. So too here, for what could be of more fundamental interest to the potential homeowner than driving down a residential street and seeing that a particular home which strikes his or her fancy is for sale.

Nor does the existence of methods other than house signs to advertise homes for sale - such as realty companies and newspapers - diminsh the substantial nature of the infringment on First Amendment rights. A limitation to such alternatives discriminates against homeowners who might wish to sell without resort to the services (and concommitant commission) of a realtor or who, for financial or other reasons, do not wish to purchase commercial advertising in news media.3/

3/ It should be noted that this sign ban affects not only those persons who sell property for a living, but also the individual homeowner who may be selling or buying a home for a variety of personal reasons far removed from profit. Thus, to characterize this ban as a regulation of "business" would ignore the central role the family home plays in each citizen's life.

Moreover, this Court has noted that such alternatives do not lessen the infringement on the First Amendment rights of the recipients of the message:

> We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means. Nor have we recognized any such limitation on the independant rights of the listener to receive the information sought to be communicated. Virginia State Board of Pharmacy, supra, 48 L.Ed.2d at 356, n. 15.

Finally, of course, if one credits the District Court's reading of the record, the ban on signs not only denies basic information to the prospective consumer, thereby increasing reliance on the realtor, but it also facilitates the possibility of illegal, racially discriminatory practices by realtors because it reposes in them total control over information about who is buying and who is selling.

Given its narrow view of the protection available to the speech at issue here, the court below failed to analyze these issues with the requisite care. In Virginia State Board of Pharmacy, the Court framed the issue and stated its conclusion as follows:

> What is at issue is whether a state may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions, we conclude that the answer to this one is in the negative. 48 L.Ed.2d at 365 (footnote omitted).

We submit that the issue here is precisely the same, and, for the following reasons, the Court should reach the same conclusion.

B. The ordinance has not been shown to advance significant governmental interests in ways sufficient to justify the restrictions on First Amendment activity.

Under normal rules for analyzing prohibitions or restrictions on the communication of truthful and otherwise lawful information, any such bans are presumptively unconstitutional, see, e.g., Nebraska Press Ass'n. v. Stuart, ___ U.S. ___, 49 L.Ed.2d 683 (1976), some prohibitions cannot be justified at all, see Mills v. Alabama, 384 U.S. 214 (1966), the state normally carries a heavy burden of justification that the restraint or prohibition is necessary to further a compelling state interest, NAACP v. Button, 371 U.S. 415, 438-49 (1963), the

state must show that the restriction on speech is drawn as narrowly as possible and that no less restrictive means of regulation will achieve the state's goals with equal facility, Shelton v. Tucker, 364 U.S. 479, 488-90 (1960), and, finally, "...in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression." Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 508 (1969).

But the Court need not decide whether those rules are fully applicable in assessing the validity of restrictions on the communication of commercial information. Nor, indeed, do the amici suggest that all such rules must be employed. With the Court, we agree that the First Amendment protection to be afforded to commercial speech does not require that all First Amendment doctrines and rules be fully operative. Restrictions may be permissible on commercial speech which if imposed on political speech would be intolerable - for example, regulation to prevent fraud and misrepresentation, even including prior restraints on objectively false commercial information; restrictions on advertising when public health and safety necessitate.

The Court need not reach such questions because it is clear from Bigelow v. Virginia, supra, and particularly from Virginia State Board of Pharmacy, supra, that, even where a

restriction on commercial information is involved, the government must meet a substantial burden of demonstration that the restriction closely, precisely, and necessarily advances an important societal interest sufficient to overcome the speech interest. It is our submission that no such showing has been made here, particularly since, as in Virginia State Board of Pharmacy, the justification for the ordinance is based upon "...the reactions it is assumed people will have to the free flow of... information." 48 L.Ed.2d at 362-63.

As a consequence of its assumption that commercial speech remained essentially unprotected or only marginally protected under the First Amendment, the Court of Appeals, however, failed to engage in such an analysis. Instead, that court placed the burden on plaintiffs to prove the unreasonableness of the ordinance, cloaked the enactment in a presumption of validity, and demanded that the plaintiffs "establish, at least prima facie, that the ordinance is so unreasonable and arbitrary as to amount to an impermissible infringment on constitutional guarantees." 535 F.2d at 793. Under Virginia State Board of Pharmacy, that approach was improper, and the burden of justification must rest with the government. For the following reasons, that burden cannot be met.

(1) The sign prohibition at issue is not merely a "time, place, and manner" regulation.

The conclusion below that the ordinance was a permissible "manner and place limitation" on speech misperceives the meaning and proper application of the "time, place and manner" controls permitted under this Court's cases. Banning all "For Sale" and "Sold" signs is, instead, an impermissible restriction on the content of speech.

Although the Court in Virginia State Board of Pharmacy, supra, cited "time, manner, and place" regulations as one permissible control on otherwise protected commercial speech, the Court identified the limited nature of such regulations, 48 L.Ed.2d at 363-64, and the Court's precedents allowing such restrictions make clear that the Willingboro sign ordinance does not fit into this category. See Cox v. Louisiana, 379 U.S. 536, 554-555 (1964)(demonstration); Cameron v. Johnson, 390 U.S. 611 (1968)(courthouse picketing); Grayned v. City of Rockford, 408 U.S. 104 (1972)(anti-noise ordinance); Kovacs v. Cooper, 336 U.S. 77 (1949)(sound trucks). In each of these cases the Court has recognized the need for practical and necessary traffic and noise controls on the manner of exercising freedom of speech. But the controls must relate to actual, specific, and immediate circumstances, such as the need for public order, traffic control or

the continuation of public functions. There is no claim here that "For Sale" signs create immediate public disorders, or cause traffic disruptions.

More significantly, however, in none of those cases has the Court upheld restrictions based on the content of the speech. Sound and traffic controls apply evenhandedly to those espousing all points of view, not just one. On the other hand, "Clearly the government has no power to restrict such activity because of its message." Grayned v. City of Rockford, supra, 408 U.S. at 115. The anti-sign ordinance in issue here, however, bans certain signs specifically because of the message they carry. Front yard posters advertising church bazaars or supporting a political candidate are not forbidden; "For Sale" signs are. The ordinance does not prohibit these signs because of the manner in which they are displayed, or the time of the day when they may be viewed, or their placement on the street; it prohibits the signs because of what they say. Whatever else may be said of this restriction, it cannot be justified under the "time, place and manner" doctrine. See Buckley v. Valeo, 424 U.S. 1, 46 L.Ed.2d 659, 687 (1976).

(2) The sign prohibition cannot be justified on the basis of the contents of the signs.

In a very few, limited kinds of circum-

stances the Court has permitted regulation of speech based upon its content. The Court has allowed or accepted limited control of obscene materials, Miller v. California, 413 U.S. 15 (1973), of advocacy of imminent lawless action likely to incite such action, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969), of "fighting words," Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942), cf. Gooding v. Wilson, 405 U.S. 518 (1972), of defamatory speech uttered with "actual malice," Gertz v. Robert Welsh, Inc., 418 U.S. 323, 340 (1974), and of advertisements proposing illegal activities. Cf., Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations, 413 U.S. 376 (1973).4/

4/ The Court in Young v. American Mini-Theater, 49 L.Ed.2d 310, 325 (1976), suggested that "the measure of constitutional protection to be afforded commercial speech will surely be governed largely by the content of the communication." The examples given in Young and also in Virginia State Board of Pharmacy, however, clearly indicate that the content of a "For Sale" sign does not justify its prohibition. Such a sign does not convey deceptive, misleading or false information. Virginia State Board of Pharmacy, 48 L.Ed.2d at 364-65. There is no claim here, nor could there be, that the information is false; these statements are true in all respects, which is a critical distinction. Cf. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). Nor does a "For Sale" sign (continued)

But nowhere has the Court permitted controls on the content of non-obscene, truthful, lawful speech simply because the speech may provoke fear in the listeners or viewers, causing them to take political or personal action, or because the speech aroused "undifferentiated fear or apprehension of disturbance," Tinker v. Des Moines Community School District, 393 U.S. 503, 508 (1969), in the minds of government authorities. If "For Sale" signs may be prohibited to dissuade citizens from moving from a community, how much more effective it would be to censor disturbing reports of crime, taxes, pollution, and educational difficulties. But that was not the choice made by the First Amendment. It is beyond dispute that free speech may not be constrained for the purpose of preserving "community stability."

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advertise illegal activities. 48 L.Ed.2d at 365. Finally, the Young Court's citation of Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), is inappropriate to the issues here. There a city was permitted discretion in what advertisements it would allow on city transit vehicles. The Court held that such vehicles were not a First Amendment forum. But "public thoroughfares" are free speech forums, 418 U.S. at 303, and Willingboro has restricted speech on private property adjacent to a public thoroughfare.

> "The principle is plain that there can be no interference with freedom of expression on the general ground that it will lead to social change, or change at the wrong rate, or in the wrong direction." Emerson, The System of Freedom of Expression, (1970), 47.

Thus, neither the Court's cases on regulation of the content of speech nor its suggestions that there might be deviations from such rules where commercial speech is concerned justify the prohibition on content sought to be achieved here.

(3) The record does not support the purported need for the ordinance.

Even assuming arguendo that controls on "For Sale" and "Sold" signs could, in certain circumstances, be employed as part of a systematic effort to avert blockbusting, panic selling, and housing segregation, Willingboro's ordinance must still fall because the record here fails to demonstrate any such serious circumstances requiring such a prohibition.

The District Court found that the purpose of the sign ordinance was "to promote a racial balance or more properly, a racial imbalance, in order to perpetuate existing racial lines" and to freeze in "past discrimination, denying blacks a fair opportunity to find suitable housing." (App. 8a). The Circuit Court rejected that finding and then, with a nice bit of semantic line-drawing, held that the purpose was to "stabilize" the community, to diminish "the number of neighbors leaving on the basis of fear alone," 535 F.2d at 797, and to "nip panic-selling in the bud," Id. at 798. The respondents claim that the purpose was to prevent the metamorphosis of Willingboro "from an integrated community to a ghetto." Brief in Opposition, p. 8.

Significantly, although the record does show an increasing non-white population in Willingboro (from 12 per cent to 18 per cent from 1970 to 1973; from 0.5 per cent to 12 per cent from 1960 to 1970) (App. 128a), this increase occurred "without the formation of a racially segregated area or 'ghetto'." 535 F.2d at 789. There was, as the District Court found, no evidence of massive "white flight," no evidence of blockbusting or fear-provoking real estate tactics, and no evidence of declining property values. There was merely the concern that the existence of "For Sale" signs would create a "fear psychology" in the community, a fear that a large turnover in home-ownership "was resulting in a substantial influx of minority groups ...beyond what could be sustained without the community itself turning into a ghetto within the county." (Testimony of Mayor W.

J. Kearns, App. 181a.)[5/]

On this record, a municipality may not control the content of protected commercial speech in the name of "community stability" or in order to assauge the inchoate fears of the citizenry.

The only other reported case upholding a similar ban on real estate signs, Barrick Realty, Inc. v. City of Gary, 354 F.Supp. 126 (N.D. Ind. 1973), aff'd, 491 F.2d 161 (7th Cir. 1974), is not to the contrary. That case dealt with one part of the governmental response to Gary, Indiana's "inner-city" crisis. The record showed:

> ...first, widespread conditions of segregated housing; and second, the social and economic breakdown which accompanies rapid racial transformation of an entire neighborhood or area of the city. Directly related to both these problems is the mass flight of white residents from transitional areas of the city. To illustrate, population statistics show that between the years 1960 to 1970, the white population of Gary decreased by 24.9 percent while the non-white population increased by 34.9 percent. This rapid population turnover is caused in large part by the phenomenon of "panic selling." The immediate objective of the ordinance in question is to bring this massive population shift under control by reducing the rate of panic selling in Gary.
> 354 F.Supp. at 134.

5/ Assuming that panic selling was already occurring in Willingboro - a fact not established by the record - there was no evidence that the sales would be to minority group members only and no evidence that the turnover in home-ownership would result in the transformation of Willingboro into a ghetto.

The record also showed that some real estate brokers who placed these signs "...actively encouraged resegregation by unlawfully urging whites to sell quickly before they had black neighbors and lower property values." 491 F.2d at 164.

The situation in Willingboro is strikingly different. Gary is an urban city in the center of a concentrated industrial area, Willingboro is a New Jersey suburb. Instead of suffering from "widespread segregated housing," Willingboro has avoided "the formation of a racially segregated area or 'ghetto'." 535 F.2d at 789. While the non-white population in Willingboro increased, the total white population also increased significantly from 1960 to 1970, and dropped

only slightly (by under 2,000) from 1970 to 1973 (App. 128a). The record, moreover, gives no evidence of blockbusting by real estate brokers, no evidence of declining property or social values,[6] and no evidence of panic selling or abnormally high home turnover rates.

The record here demonstrates only the fear that sizeable numbers of white families might begin moving out of Willingboro, that they might be replaced by black families, that the presence of "For Sale" signs might encourage this trend and might lead to panic-selling. Without showing more than this generalized concern over an incipient problem, Willingboro cannot be said to have demonstrated a substantial municipal interest in prohibiting "For Sale" signs. If, faced with a state's "strong interest in maintaining" the professionalism of pharmacists, the Court nevertheless upheld the First Amendment right to advertise drug prices, Virginia State Board of Pharmacy, 48 L.Ed.2d at 361, then surely faced with only generalized, predictive fears of population shifts, this Court should not

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6/ Some citizens apparently thought the property values, though increasing, were not rising as quickly as elsewhere. 535 F.2d at 809.

permit a blanket prohibition of "For Sale" signs. The same interests in the free flow of commercial information exist here as in Virginia State Board of Pharmacy. Since significant contrary interests have not been shown to exist, First Amendment rights should enjoy continuing protection.

Accordingly, under the facts of this case, the Court need not consider whether a similar sign control would be permissible in circumstances where "white flight" is an urgent reality and where the sign ordinance is part of a governmental scheme to control conduct, such as patterns and practices of blockbusting. See Barrick Realty, Inc., supra; see also, United States v. Mitchell, 327 F.Supp. 476 (N.D. Ga. 1971). Your amici support anti-blockbusting statutes which prohibit false or deceptive statements concerning changes in the racial, religious or national origin character of a neighborhood, and/or the effect of those changes, made with the intent for commercial gain, to promote the sale of property. Cf. Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, supra.

We have serious doubts, however, about the validity of the Barrick decision to the extent that it upholds a ban on communicating truthful information about lawful transactions. But whatever the resolution of that issue would be in that context, the record here does not require the Court to resolve such issues.

Similarly, a decision invalidating the ordinance here on the record here would not necessarily call in to question federal and

state anti-blockbusting provisions, such as 42 U.S.C. Section 3604(e), which courts have found to be constitutional as construed to regulate the conduct of inducing a person to sell his home by making certain representations. See United States v. Mitchell, supra, 327 F.Supp. at 486. In the instant case, however, the township Council did not so limit its sign ban; indeed, the record shows virtually no apprehension at all of the problem of blockbusting in Willingboro.

Instead, Willingboro chose to achieve social goals well short of preventing blockbusting, and did so through the mechanism of censorship. Assuming that Willingboro may constitutionally seek what the Circuit Court called "community stability," clearly more, rather than less, speech is the means prescribed by our constitution for achieving that goal. The Circuit Court noted that the sign issue occasioned "two years of public ferment," 535 F.2d at 791, that the township Council "investigated...consulted...[and] held two public meetings..." before it acted. 535 F.2d at 799. Under the First Amendment, those efforts should rather have been directed toward an effort to allay the incipient fears of the community, to spread before them the facts - that there was no blockbusting, no massive influx of minorities, no precipitent decline in property values - and to seek community stability through understanding and concensus. The choice was between seeking

the community goal through disclosure and dialogue or through government-imposed citizen ignorance. What Willingboro chose was the alternative forbidden by the First Amendment. For what the Court said of the price of drugs is no less true of the sale of homes:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.... But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.... In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have re-enforced our view that it is. 48 L.Ed.2d at 363.

CONCLUSION

For the reasons set forth above, the decision below should be reversed.

Respectively submitted,

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January 1977

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*/ Counsel wish to express their appreciation to Terry Thatcher, a third-year student at the Yale Law School, for his assistance in the preparation of this brief.